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Supreme Court, U.S.
FILED

NOV 25 1991

OFFICE OF THE CLERK

NO. 91-736

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

COMMONWEALTH OF MASSACHUSETTS,
Petitioner

v.

ROGER MOREAU,
Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI TO THE
MASSACHUSETTS APPEALS COURT

and

MOTION TO PROCEED IN FORMA PAUPERIS

* Daniel J. O'Connell, III
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* Counsel of Record

32pp

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

No. 91-736

COMMONWEALTH OF MASSACHUSETTS,)
 Petitioner)
)
v.)
)
ROGER MOREAU,)
 Respondent)

MOTION TO PROCEED IN FORMA PAUPERIS

Respondent Roger Moreau, by his attorney Daniel J. O'Connell, III, hereby moves this Court pursuant to Rule 39 of the Rules of the Supreme Court of the United States for permission to proceed in Forma Pauperis in opposition to the petitioner's Petition for Writ of Certiorari, and in any and all subsequent proceedings before this Court.

As grounds for this motion, respondent's affidavit in the form prescribed by Federal Rules of Appellate Procedure Form 4 is attached hereto.

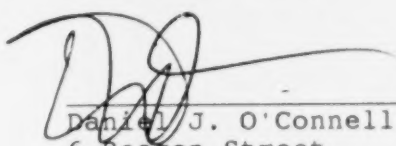
As additional grounds, the respondent has been incarcerated and destitute since 1986. Respondent's family retained counsel to review and vacate the proceedings which led to defendant's guilty plea and incarceration in 1986; however, since the date counsel was hired, respondent's family's resources have been depleted and they are without funds to pay for the printing of briefs or fees for counsel.

For the foregoing reasons, it is requested that the Motion for Permission to Proceed in Forma Pauperis be granted and that

respondent be permitted to serve and file typewritten briefs,
pursuant to Rule 39.5.

Leave for permission to proceed in Forma Pauperis has not
been sought in any other court.

Respondent,
Roger Moreau,
By his attorney

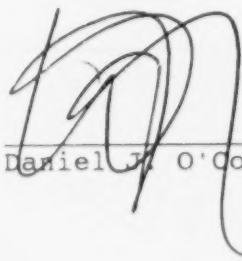


Daniel J. O'Connell, III
6 Beacon Street
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(617) 227-4040

CERTIFICATE OF SERVICE

I, Daniel J. O'Connell, III, hereby certify that the
foregoing document was served upon the Commonwealth by mailing a
true copy thereof, this *25* day of *November* 1991, as follows:

Paula J. DeGiacomo
Assistant Attorney General
One Ashburton Place
Boston, MA 02108



Daniel J. O'Connell, III

COMMONWEALTH OF MASSACHUSETTS

SUPREME COURT OF THE

~~XXXXXX XXXXXX~~~~United States District Court~~

v.

FOR THE

ROGER MOREAU

Affidavit in Support of Motion on Appeal in Forma Pauperis

I, Roger Albert Moreau, being first duly sworn, depose and say that I am the defendant in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress, and that the issues which I desire to present on appeal are the following:

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

☐ YES
☒ NO

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of last employment and the amount of the salary and wages per month which you received.

1980 2000.00 per month

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

☐ YES
☒ NO

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account?

☐ YES
☒ NO

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

☐ YES
☒ NO

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

None

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

SIGN

Roger Moreau
SUBSCRIBED AND SWORN TO before me this

11 day of NOV, 1991
Conthy R. Piro

Let applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

Justice of the ~~United States District Court~~
Supreme Court

NO. 91-736

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COMMONWEALTH OF MASSACHUSETTS,
Petitioner

v.

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BRIEF OF RESPONDENT IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI TO THE
MASSACHUSETTS APPEALS COURT

* Daniel J. O'Connell, III
6 Beacon Street, Suite 900
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(617) 227-4040

* Counsel of Record

Question Presented

1. Whether the Court has jurisdiction to hear and decide this case pursuant to 28 U.S.C. §1257.

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BRIEF OF RESPONDENT IN OPPOSITION TO
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MASSACHUSETTS APPEALS COURT

JURISDICTION

Respondent Roger Moreau argues that this Court lacks jurisdiction over this case pursuant to 28 U.S.C. §1257.

In its jurisdictional statement, the Commonwealth erroneously states that the Superior Court has stayed further proceedings "until this Court takes final action in this case" (Pet., p.2.) The Superior Court's stay is actually in effect "until either a denial of [the Commonwealth's] petition for a writ of certiorari or until the United States Supreme Court takes final action in the case." (Pet., Appendix D; emphasis supplied.)

CONSTITUTIONAL PROVISIONS AND STATUTES

FIFTH AMENDMENT

"No person . . . shall be compelled in any criminal case to be a witness against himself."

SIXTH AMENDMENT

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

28 U.S.C. §1257. State courts; certiorari
(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari. . . .

whether Moreau had been denied effective assistance of counsel pursuant to Commonwealth v. Saferian, 366 Mass. 89, 315 N.E.2d 878 (1974).

Statement of Facts

On October 2, 1985, Roger Moreau was arrested by the Springfield Police in connection with an incident that had occurred in the Town of Warren. He was initially brought to the Springfield Police Department where attempts were made to interrogate him over an extended period of time. Although the Springfield Police persistently advised him to make a confession, Moreau refused to make any statement. Custody of Moreau was transferred to the Warren Police and State Police early in the morning on October 3, 1985, and he was held and questioned until his eventual transportation to court that morning. During that period Moreau again refused to make any statement in response to repeated demands by the police. (Appendix A, Moreau Affidavit, submitted in support of Motion for New Trial.)

On October 3, 1985, Moreau was taken to Spencer District Court at approximately 9:00 a.m. Moreau's co-defendant Ralph Caron had arrived at the Spencer District Court accompanied by Attorney John Fitzgerald and Caron was arrested at Spencer District Court that morning in connection with the incident. (Appendix B, Fitzgerald Affidavit, submitted in support of Motion for New Trial.)

Attorney John Fitzgerald, who had been retained to represent Moreau, appeared at the courthouse that morning and conferred with him regarding the incident. During their conference, Moreau confided certain information to Attorney Fitzgerald regarding the details of the alleged offenses and he reiterated to Fitzgerald that he did not want to make any statement regarding the incident. He was advised by Fitzgerald that he would be held on high bail if he did not make a statement. (Appendices A and B.)

On October 3, 1985, Fitzgerald was simultaneously representing Ralph Caron. Caron was also advised by Fitzgerald to make a statement to the Warren Police at the courthouse. At approximately 11:30 a.m., Caron gave a statement in accordance with Fitzgerald's advice which incriminated him and Moreau. Fitzgerald subsequently counseled Moreau to make a statement if he wanted to be released on bail. He never told Moreau that he would be waiving his privilege against self-incrimination and thereby providing the police with sufficient evidence to convict him of the serious charges for which he had been arrested. Fitzgerald never apprised Moreau of the penalties applicable to convictions for those charges. In accordance with Attorney Fitzgerald's advice, Moreau made a statement at approximately 1:15 p.m. which incriminated him and Caron. Moreau was subsequently released on bail that evening and appeared again in Spencer District Court

on October 4, 1985 for arraignment. Despite the fact that Moreau had been arrested and was held at court for the entire day on October 3, 1985, he was not arraigned on that day. (Appendix A.)

Direct indictments were returned against Moreau and Caron on January 15, 1986. Moreau's statement was presented to the Grand Jury which returned the indictments. Moreau was indicted on three offenses: armed burglary, assault and battery by means of a dangerous weapon, and assault and battery.

On April 24, 1986, Roger Moreau pleaded guilty upon the advice of Fitzgerald and, upon joint recommendation of Fitzgerald and the Commonwealth, was given a 12 to 25 year sentence on armed burglary, a sentence which exceeded the sentencing guidelines.

During the course of his representation of Roger Moreau from October 3, 1985, to the Court's imposition of sentence on April 24, 1986, Fitzgerald never advised Moreau about a conflict of interest arising from his joint representation of co-defendants Moreau and Caron. At no time did Fitzgerald ever discuss with Moreau the sufficiency of the Commonwealth's case against Moreau nor the possibility of filing a motion to suppress the statement given at Spencer District Court. In addition, Fitzgerald never discussed with Moreau the possible sentences for the alleged indictment until April 24, 1986,

when Fitzgerald told him at court that his only choice was to plead guilty. At no time did Moreau understand that Fitzgerald had entered into a joint recommendation for a sentence that exceeded the sentencing guidelines.

SUMMARY OF ARGUMENT

Because the decision below is a non-final interlocutory decision of a lower level state appellate court, the requirements for a writ of certiorari set forth in 28 U.S.C. §1257 have not been met. The exceptions to the finality requirement described in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), do not apply because both parties will have a right to appeal after the trial court conducts the evidentiary hearing on remand. The constitutional issues will not "escape" review, as in Pennsylvania v. Ritchie, 490 U.S. 39 (1987).

If the Court were to grant certiorari and decide the issue raised by the Commonwealth, a hearing before the trial court would still be required. Many of the ineffective assistance of counsel issues arose after arraignment, and there is no question that Moreau is entitled to a hearing on these issues pursuant to Commonwealth v. Saferian, 366 Mass. 89, 315 N.E.2d 878 (1974). As such, the Appeals Court decision rests on adequate and independent state grounds and must not be disturbed.

At the very minimum, Moreau must be permitted to create an evidentiary record in order to afford the Commonwealth's highest court and, if appropriate, this Court, the opportunity for a complete and intelligent review of the issues. California v. Rooney, 107 S.Ct. 2852 (1987).

I. THE COURT LACKS JURISDICTION TO
HEAR AND DECIDE THIS CASE
PURSUANT TO 28 U.S.C. §1257

The Commonwealth improperly invokes this Court's jurisdiction pursuant to 28 U.S.C. §1257, in that the decision of the Appeals Court: A) is not a final judgement of the state's highest court; and B) rests on adequate and independent state grounds. For these reasons, certiorari must be denied.

A. The Opinion of the
Massachusetts Appeals Court Is Not a
Final Judgment of the State's Highest Court

The Commonwealth admits that the opinion of the Appeals Court is interlocutory in nature. Normally, the Supreme Court "is without jurisdiction to review an interlocutory judgment. . . ." Pennsylvania v. Ritchie, 480 U.S. 39, 47 (1987). The Commonwealth, however, asserts in a footnote (Petition, p.11) that the case is "within one of the well-established exceptions to the finality doctrine", citing Pennsylvania v. Ritchie, id,

and Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).^{1/} However, the Cox Broadcasting Corp. exception held to be controlling in Ritchie is inapplicable here.

First and foremost, Ritchie was an appeal from the decision of Pennsylvania's highest court, the Supreme Court. Id. at 46. By contrast, the Commonwealth in this case is seeking review of the decision of the Massachusetts Appeals Court, a mid-level appellate court. The State's highest court, the Supreme Judicial Court, refused further appellate review at this stage, which is not surprising in view of the number of issues which the Appeals Court directed the Superior Court to address on remand. (Petition, 16A - 18A.)

Second, this is not a case (as was Ritchie), in which "the Sixth Amendment issue will not survive for this Court to review, regardless of the proceedings on remand." Id. at 48, citing Cox Broadcasting Corp., id., at 481. This Court in Ritchie was presented with a Sixth Amendment Confrontation Clause issue decided by Pennsylvania's highest court after a full trial on the merits. This Court concluded that, based on the "unusual facts of [the] case, the justifications for the finality doctrine would be ill-served by another round of litigation on an issue

^{1/} The Commonwealth is apparently relying solely on just one of the Cox Broadcasting Corp. exceptions which was found to be controlling in Ritchie; the other three categories of exceptions to the finality requirement are not applicable.

that has been authoritatively decided by the highest state court." In Moreau, there has been no trial on the merits, no hearing on the Fifth and Sixth Amendment issues and no authoritative decision by the state's highest court.

On remand, the trial court was directed to conduct a hearing to determine whether Moreau should be permitted to withdraw his guilty plea on the grounds of ineffective assistance of counsel, utilizing the two-pronged test set forth in Commonwealth v. Saferian, 366 Mass. 89, 315 N.E.2d 878 (1974). The Appeals Court noted that Moreau was alleging three claims of ineffective assistance: poor advice prior to trial, at the plea and at sentencing. (Petition, p.14A.) The subsidiary issues include the strength of the Commonwealth's case at the time Moreau was advised by counsel to make a confession, the investigation (if any) undertaken by counsel to verify the information given to him by the police, and whether Moreau was prejudiced by his attorney's obvious conflict of interest. Only after these issues are decided will the case be ripe for full appellate review.

Whoever does not prevail at the hearing will have a right to appellate review. The Commonwealth has a statutory right to appeal after the hearing. M.G.L. c.278, §28E; Mass.R.Crim.P. Rule 15. This case has obviously not reached the stage which, as in Ritchie, a

conviction or acquittal after retrial could preclude an appeal.

B. The Decision of the Appeals Court Rests
On Adequate and Independent State Grounds

The Commonwealth asserts (once again, in a footnote) that the Appeals Court provided no "clear statement" that its decision rested on adequate and independent state grounds, citing Michigan v. Long, 463 U.S. 1032 (1983). The Commonwealth incorrectly argues that the Appeals Court's opinion cites only two inapposite state court decisions, and that the Court's decision was actually based on an "incorrect understanding" of Escobedo v. Illinois, 378 U.S. 478 (1964) and United States v. Gouveia, 467 U.S. 180 (1984). Therefore, the Commonwealth erroneously concludes that the Supreme Court has jurisdiction to hear this case.

In arguing that there is no clear statement that the decision is based on state law, the Commonwealth ignores the fact that the opinion is written by a mid-level appellate court on an interlocutory, non-final proceeding which is in its initial stages. The Appeals Court should not be expected to anticipate that its opinions will be subject to direct scrutiny by the United States Supreme Court, whereas the state's highest court can expect to be held to this standard.

In its Petition, the Commonwealth focuses exclusively on the pre-indictment confession, failing to note that this is but one of the three ineffective assistance claims.² If the Supreme Court were to reverse this portion of the decision of the Appeals Court, Moreau would still be entitled to a hearing as a matter of law on his ineffective assistance claims which occurred after arraignment, at the plea stage and at his sentencing. Commonwealth v. Saferian, *id.* This hearing will, in all likelihood, result in an appeal by one or both parties. This will occur even if the Supreme Court grants certiorari, and would be a result which is the opposite of that deemed desirable by the Ritchie decision. Review at this time would be "speculative and premature". California v. Rooney, 107 S.Ct. 2852 (1987).

There is no reason to overrule the decision of the Appeals Court. The Commonwealth presumes that the Appeals Court misapplied Escobedo and Gouveia by extending the reach of the Sixth Amendment right to counsel to a pre-adversarial stage of the proceeding. This argument ignores the fact that the Appeals Court recognized that

^{2/} Even if the Appeals Court arguably erred in holding that Moreau was entitled to effective assistance of counsel prior to arraignment, the pre-indictment ineffective assistance claim could also be considered in determining whether Moreau's confession was voluntary pursuant to Escobedo v. Illinois, *id.*, and Miranda v. Arizona, 384 U.S. 436 (1966). The factual inquiry remains the same in either instance and is dictated by state - not federal - law. Commonwealth v. Saferian, *id.*

"[t]he first question is whether . . . the defendant's written statement was made before the right to counsel attached." (Petition, 4A.) The Court duly noted that the right to effective assistance of counsel is "only as broad as the right to counsel on which it rests", citing Commonwealth v. Jones, 403 Mass. 279, 286 (1988). The Court went on to state that the Sixth Amendment right to counsel "may not yet have matured" at the time Moreau confessed. (Emphasis supplied.) Because Moreau argued on appeal that the functional equivalent of adversary judicial proceedings had been initiated³, it is reasonable to construe the Appeal Court's refusal to unequivocally state that adversary judicial proceedings had not commenced, to mean that such proceedings may actually have commenced. In any event, this is a question of state law which should be decided by the state's highest court.

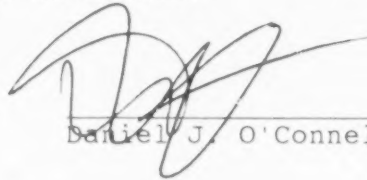
For the foregoing reasons, the opinion of the Appeals Court rests on adequate and independent state grounds. Alternatively, as the Commonwealth is seeking review of a decision by a court other than the state's highest, the "clear statement" of state grounds required by Michigan v.

³/ This argument is based on Moreau's extended pre-statement custody, his presence in court the entire day of October 3, 1985, and the requirement of prompt arraignment set forth in Mass.R.Crim.P. Rule 7.

Long, id., should be relaxed, in order to avoid the unnecessarily duplicative proceedings and uncertainty which the rule was intended to remedy.

CONCLUSION

For the foregoing reasons this Court lacks jurisdiction pursuant to 28 U.S.C. §1257 and the Petition for Writ of Certiorari must be denied.



Daniel J. O'Connell, III

Dated: November 25 1991
Boston, Massachusetts

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS.

SUPERIOR COURT
NOS: 86-111225,
86-111226, 86-111227

COMMONWEALTH)
)
v.)
)
ROGER MOREAU)

AFFIDAVIT

I, Roger Moreau, on oath do depose and state that:

1. I am the defendant in the above-captioned case and I am presently incarcerated at the Massachusetts Correctional Institute located at Lancaster, Massachusetts.
2. On October 2, 1985, at approximately 11:00 p.m., I was arrested by Springfield Police Officers and taken to the Springfield Police Station for an incident that had occurred in Warren, Massachusetts.
3. While I was detained at the Springfield Police Station for an extended period, I was repeatedly questioned by at least four police officers who told me that I should admit to being involved in a house break in Warren. I refused to make any statement in response to the officers' demands.
4. I was subsequently transferred to the custody of other police from Warren and to the state police. I was repeatedly questioned by several officers at the different locations who continued to state that I should confess and make a statement. I refused to make any statement in response to the officers' demands.
5. I was subsequently taken by the police to the Spencer District Court on the morning of October 3, 1985, at approximately 9:00 a.m., where I remained in custody.
6. I met Attorney Fitzgerald at the courthouse that morning as a result of my mother having contacted him to represent me. He agreed to represent me at that time and I confided to Attorney Fitzgerald that morning concerning my involvement in the incident in Warren. He was also representing Ralph Caron at that time. At some point, before 11:30 a.m., I entered the courtroom with Attorney Fitzgerald and I heard someone say "looks like a \$100,000. bail." I did not see any judge in the courtroom at that time.

7. When I conferred with Attorney Fitzgerald during the morning on October 3, 1985, in the courthouse, he never told me that there might be any conflict of interest in his representation of Ralph Caron and me. He never told me what Caron would say in terms of making a statement nor did he tell me what Caron said before I gave a statement at approximately 1:15 p.m. that day.
8. Before I gave a statement on October 3, 1985, Attorney Fitzgerald told me that it would be in my best interest to make a statement and that it might result in a low bail. The police had told me that "the only way you're going today is if you make a statement." Attorney Fitzgerald never told me that I would be relinquishing my right against self-incrimination and that my statement itself would constitute sufficient evidence for the Commonwealth to secure a conviction which could result in imprisonment. He never discussed with me the nature or sufficiency of any evidence that the Commonwealth had at that time regarding my alleged involvement in the incident.
9. At approximately 1:15 p.m. on October 3, 1985, as the result of Attorney Fitzgerald's advice, I made a statement to the police at the Spencer District Courthouse regarding my involvement in the alleged incident, and I signed a statement prepared by one of the officers, a copy of which is attached as Exhibit A.
10. Although I was detained at the Spencer District Court from approximately 9:00 a.m. on October 3, 1985, for the entire day, I was not formally arraigned until the following day, October 4, 1985.
11. The statements made by Ralph Caron and me were presented to the Grand Jury which returned indictments against me on or about January 15, 1986, charging armed burglary, assault and battery by means of a dangerous weapon and assault and battery.
12. I was represented by Attorney Fitzgerald at all times from October 3, 1985, to and including April 24, 1986, when I pleaded guilty and sentence was imposed. At no time did Attorney Fitzgerald ever discuss the strengths or weaknesses of the Commonwealth's case against me nor did he ever discuss the filing of any motion to suppress my statement or any other trial strategy.
13. When I arrived at the Worcester Superior Court on April 24, 1986, I met briefly with Attorney Fitzgerald. He left me at one point and returned to say that "It looks like a 5 to 7 year sentence." When I told him that I was not expecting that, he said that he would confer with the district

attorney. He returned and said that the district attorney was asking for a 12 to 25 year sentence if I would plead guilty. I was told that I would get an 18 to 30 year sentence if I took the case to trial. When I told him that I wanted to take the case to trial, Attorney Fitzgerald said that we would not win. He said that "the statements you made will convict you." When I asked him why he told me to make a statement to the police, he said "I may have made a mistake. You can blame me, but I thought I was doing the right thing."

Attorney Fitzgerald also said that I should take the 12 to 25 year sentence because I would get 18 to 30 years if we went to trial. When I asked him if the trial could be postponed so that I could collect my thoughts, he responded that "The trial begins today. Your only choice is to plead guilty."

Attorney Fitzgerald also told me before the hearing that day that "just because the D.A. recommends the 12 to 25 years, doesn't mean the judge has to go along with it. The judge could lower that sentence to whatever he feels is appropriate." He said he could get the sentence reduced on appeal. Attorney Fitzgerald never told me prior to the actual hearing that he had agreed to a joint recommendation.

14. At no time prior to the imposition of the sentence did Attorney Fitzgerald ever tell me that I had the right to present mitigating circumstances to the Court for the purpose of the Court's discretion in imposing sentence. He never discussed possible penalties with me prior to April 24, 1986, other than his comment to me once that "if everything goes bad, you might do a year."

Sworn to under the pains and penalty of perjury this 23rd
day of MARCh, 1990.

Roger Moreau
Roger Moreau

(1)

03 Oct 1985

1315 NRS

I Roger A Moreau D.O.B. 2-1-63 SS # 030522024 10 Wolcott St. Springfield make this statement of my own free will without promise or threat & after being advised of my Rights & in the presence of John F Fitzgerald 1350 Main St Springfield. On Sept 28 1985 myself Ralph Caron & Tadashi Guest I have known Tadashi Guest for approx 2 years & know that to be his home. We were going to WARREN to a house to break into to get a safe. This is the same house that Ralph & Tadashi had taken a big free standing Brass phone. This house is a big white house with pool with a type of marble fence we went to the back of the house Ralph had a hand gun that Ralph said he had gotten from Tadashi. I had a small knife & Tadashi had Nunchucks home made. We went into the house through an unlocked back sliding back door. Once in the house we knew someone was home due to the smell of burning wood. We looked around for money drugs

R.M.

Anything we could take. @ We all went
up stairs & found a man & a lady in
ed sleeping. We talked about it outside
the room, we went into the room &
the lady woke up & screamed I hit the
women pretty hard, then the man woke
up & started fighting with Tadashi.
While this was going on I took the
women outside in the hallway & I told
her to lay down on the floor, I looked
in the bedroom & saw Ralph w/ a gun
I pulled the hammer back to make a
sound & ~~that~~ it in front of the man
& the women were put in the
back bedroom, Tadashi went in with my
wife & told them he would slash them
Tadashi & I started looking everywhere
I stuff. Most of the time Ralph was
in the bedroom watching the man & women
Tadashi went to watch the people & Ralph
I continued to look around. Tadashi
me out of the room & Ralph went to
catch the people. Ralph told me to get
the car I went & got the car & we loaded
up we had in the car we took Brass Statues
& Jackets & Small T.V. a vacuum cleaner, cas
in the mans wallet approx \$80.00 & \$7.00 from the
women's purse after he dumped it all on
the floor, & a case of Boozie. RALPH
R.M.

(3)

told us He told the man & lady to
get under ~~the~~ bed. Ralph ran up
& check on the man & lady &
then we jumped into the car &
left we went to Tadashi's house
& split the stuff. Roger Mearns

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS

SUPERIOR COURT
NOS. 86-111225.
86-111225, 86-111227

COMMONWEALTH

VS.

ROGER MOREAU

AFFIDAVIT OF JOHN F. FITZGERALD

I, John F. Fitzgerald, member of the Bar of the Commonwealth of Massachusetts being duly sworn and under oath do depose and state as follows:

That on or about October 2nd or 3rd I was contacted by Ralph Caron who was a then current client of mine on criminal matters then pending in Hampden County. He had been requested by the Warren Police to come to the Spencer Court in connection with a matter they were investigating. He was aware that they were already holding his friend, Roger Moreau, in custody.

On October 3, 1985 I drove to the Spencer District Court with Mr. Caron. During our trip he related to me that he wanted to protect Roger Moreau and was prepared to accept the entire responsibility for any crimes they were being charged with. He insisted that he wanted to do everything he could to effect Mr. Moreau's release. I appeared at the courthouse and had a conversation with representatives of the Warren Police who outlined the case against both Caron and Moreau. They described the circumstances of the assault and the allegations of what occurred on September 29, 1985 in Warren.

As a result of my conversations with police representative, I was aware that due to the serious nature of the cases that both defendants would likely be subject to a high bail request unless each cooperated and gave a statement. The authorities were pressing me to advise both persons to make a complete disclosure of their involvement.

I then advised each Defendant that unless he made a statement it was my judgment that a high bail was likely to be imposed.

After advising Mr. Caron to make a statement and to cooperate with the Police, I also conferred with Roger Moreau and likewise advised him that the Police were well aware of all facts connected with their case even prior to Mr. Caron's written statement. He agreed to make a written statement. I was present while each made his statement.

At that time I had gone to Spencer with the understanding that I was to represent Mr. Caron, however, by agreement, spoke with and advised Mr. Moreau.

Both men were held on bail of \$500.00. Mr. Moreau was held overnight until the following day when I believe his family posted bail. Caron was released immediately since he had the necessary bail money.

Thereafter, the mother of Mr. Moreau kept requesting I represent her son. I arranged with Mr. Caron's consent to have Atty. Leonard Skvirsky of 20 Maple Street, Springfield, MA talk with Caron whereupon he agreed to accept Caron's case. I do not recall the exact date Atty. Skvirsky filed his appearance.

I represented both Defendants in the Spencer District Court up until December, 1985 when I withdrew from the representation of Mr. Caron. I continued to represent Mr. Moreau in the Worcester Superior Court when he was indicted and I counselled him to plead guilty to the offenses on April 24, 1986.

Signed under the pains and penalties of perjury this 23rd day of May, 1989.

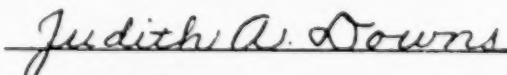


COMMONWEALTH OF MASSACHUSETTS

Hampden, ss

May 23, 1989

Then personally appeared John F. Fitzgerald and acknowledged the foregoing to be true to the best of his knowledge and belief, before me



Notary Public

My Commission expires: 2-1-96

NO. 91-736

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

COMMONWEALTH OF MASSACHUSETTS,
Petitioner
v.
ROGER MOREAU,
Respondent

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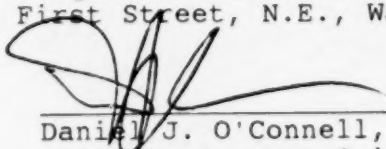
NOV 29 1991

OFFICE OF THE CLERK
SUPREME COURT, U.S.

BRIEF OF RESPONDENT IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI TO THE
MASSACHUSETTS APPEALS COURT
and
MOTION TO PROCEED IN FORMA PAUPERIS

CERTIFICATE OF MAILING

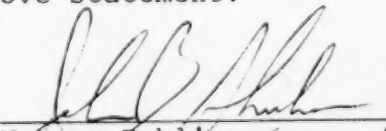
I, Daniel J. O'Connell, III, attorney for the Respondent in the above-captioned matter, hereby state of my own personal knowledge that on November 25, 1991, twelve copies of the Brief of Respondent in Opposition to Petition for Writ of Certiorari to the Massachusetts Appeals Court and Motion to Proceed in Forma Pauperis were deposited in the United States Mails in Boston, Massachusetts, first-class postage prepaid, addressed to Joseph F. Spaniol, Jr., Clerk of the Supreme Court of the United States, Supreme Court Building, One First Street, N.E., Washington, D.C. 20543.


Daniel J. O'Connell, III
6 Beacon Street, Suite 900
Boston, MA 02108
(617) 227-4040

SUFFOLK, SS.

November 25, 1991

I certify that Daniel J. O'Connell, III, appeared before me on this date and signed the above statement.


Notary Public - Commonwealth of Massachusetts
My Commission Expires: 3/14/97

O'CONNELL & POLLENZ

ATTORNEYS AT LAW

DANIEL J. O'CONNELL, III

KENNETH A. POLLENZ

ROBERT T. NAGLE

JOHN B. SHEEHAN

ALSO ADMITTED IN NEW YORK

6 BEACON STREET
SUITE 900
BOSTON, MASSACHUSETTS 02108

TEL: (617) 227-4040

FAX: (617) 227-3388

November 25, 1991

Joseph F. Spaniol, Jr.
Clerk of Court
Supreme Court of the United States
Supreme Court Building
One First Street, N.E.
Washington, D.C. 20543

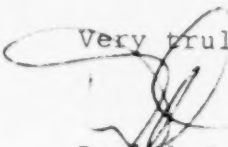
RE: Commonwealth v. Roger Moreau
Docket No. 91-736

Dear Mr. Spaniol:

Enclosed for filing in the above-referenced matter, please find twelve (12) copies of the Brief of Respondent in Opposition to the Petition for Writ of Certiorari to the Massachusetts Appeals Court with a Certificate of Service.

Also enclosed is Respondent's Motion to Proceed in Forma Pauperis.

Very truly yours,


Daniel J. O'Connell, III

DJO'C/bf

Enclosure

cc: A.A.G. Paula DeGiacomo

RECEIVED

NOV 29 1991

OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 91-736

IN THE SUPREME COURT
OF THE UNITED STATES

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

v.

ROGER MOREAU,
Respondent.

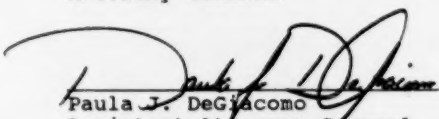
PETITION FOR WRIT OF CERTIORARI
TO THE MASSACHUSETTS APPEALS COURT

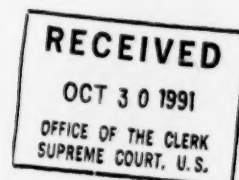
CERTIFICATE OF SERVICE

I, Paula J. DeGiacomo, Assistant Attorney General, do hereby certify that on this 28th day of October, 1991, I have given notice of the filing of the within Petition for Writ of Certiorari to the Massachusetts Appeals Court and Appendix, by mailing copies of same, first class, postage prepaid, to Daniel J. O'Connell, III, O'Connell & Pollenz, 6 Beacon Street, Boston, Massachusetts 02108, (617) 227-4040.

Respectfully submitted,

SCOTT HARSHBARGER
Attorney General


Paula J. DeGiacomo
Assistant Attorney General
Criminal Bureau
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200 ext. 2826



No. 91-736

IN THE SUPREME COURT
OF THE UNITED STATES

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,


v.

ROGER MOREAU,
Respondent.

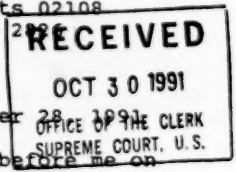
PETITION FOR WRIT OF CERTIORARI
TO THE MASSACHUSETTS APPEALS COURT

CERTIFICATE OF MAILING

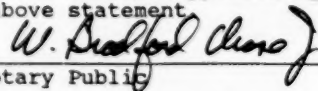
I, Paula J. DeGiacomo, Assistant Attorney General, hereby state of my own personal knowledge that on October 28, 1991, copies of the Petition for Writ of Certiorari to the Massachusetts Appeals Court in the above-captioned matter were deposited in a United States Mail Box in Boston, Massachusetts with first class postage prepaid, addressed to Joseph F. Spaniol, Jr., Clerk of the Supreme Court of the United States, Supreme Court Building, One First Street, N.E., Washington, D.C. 20543.


Paula J. DeGiacomo
Assistant Attorney General
Criminal Bureau
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200 ext. 2186

Suffolk, ss.

October 28, 1991

OFFICE OF THE CLERK
SUPREME COURT, U.S.

I certify that Paula J. DeGiacomo appeared before me on this date and signed the above statement.


Notary Public

My commission expires: March 6, 1998